IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 867 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AJAY NAINSINGH DANTANIA - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :

MR JM BUDDHBHATTI appointed by Legal Aid Committee for Appellant
MR KT DAVE ADDL.PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 02/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. A seven years old female child was kidnapped from the legal guardian and thereafter was subjected to sexual abuse as well as rape by the appellant, Ajay Nainsingh Dataniya ('the accused' for short). The accused was, therefore, charged and tried by the learned Additional Sessions Judge, Court No.9, City Sessions Court, Ahmedabad in Sessions Case No. 39 of 2003 for commission of the offences under Sections 363, 366 and 376 of the Indian Penal Code ('IPC' for short).

2. At the end of the trial, the accused was found guilty of the offences under Sections 363 and 376 IPC and resultantly he was convicted vide judgment and order dated 6.6.2003 and sentenced to suffer RI for two years and fine of Rs.3,000/- i.d., S.I. for further period of six months for commission of offence under section 363 IPC and RI for ten years and fine of Rs.5,000/- i.d., SI for further period of six

months for commission of the offence under section 376 IPC. It is also ordered that both the sentences shall run consecutively, that is, one after the other.

So far as the charge for commission of offence under Section 366 IPC is concerned, the accused was given benefit of doubt and is acquitted of the said charge.

3. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused has filed this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short).

4. Briefly stated, the prosecution case as disclosed from the FIR and unfolded during trial, is that:

4.1. P.W.1, Geetaben Jitendrakumar Sathwara, the complainant, is the sister of the mother of the prosecutrix – victim girl, aged about 7 years at the relevant time, who will be hereinafter

referred to as 'X' in this judgment, who is also her paternal aunt as both Geetaben and Sangeetaben are married to the real brothers and are residing in the same family under one roof.

4.2. As per the prosecution case, on 9.10.2002, in the evening, when Geetaben was going for purchasing vegetables in the nearby market, she found her niece 'X' returning home from school. She told her to reach home and when she returned after purchasing vegetables, her sister Sangeeta asked her the whereabouts of X and the complainant was surprised to find that X did not reach home. They made a frantic search around. At that time, the complainant suddenly found X coming out from a building which was in a dilapidated and incomplete state. She was found crying and a boy, aged 20 to 21 years, was found following her who also came out from the same building. On inquiry as to whether the boy had done anything to her, X replied in affirmative and it was realized that she was ravished. At that time, the boy started running away and with

the help of the passersby, he was caught and he was found to be Ajay alias Munno, a resident of “Saraniavas”, a slum area of “Vaghri” community. He was taken to Odhav police station and a complaint was lodged against the accused by P.W.1, Geetaben for commission of the offence under Sections 363, 366 and 376 IPC for kidnapping and ravishing X, which was registered by P.W.6, BJ Kansara, which is on record at Ex.21.

4.3. Thereafter P.W.6, BJ Kansara, started investigation. During the course of investigation, he drew the panchnama of recovery of clothes of X and thereafter X was sent with a police yadi and with a woman constable to civil hospital for medical check up. Panchnama of the person of the accused was drawn and panchnama of the recovery of the clothes of the accused was also drawn. Thereafter accused was also sent to hospital for medical check up. He recorded statement of witnesses. During the course of investigation, the accused also gave a complaint

that he was beaten by two unknown persons and therefore P.W.6, BJ Kansara, also recorded a NC complaint of the accused for commission of offences under sections 323 and 114 IPC against two unknown persons. Thereafter he drew panchnama of the scene of the offence as per the place shown by P.W.1, Geetaben. Thereafter he sent muddamal to FSL for analysis. After getting the injury certificates of X as well as the accused and after receipt of the report from FSL and as incriminating evidence was found against the accused, P.W.6, BJ Kansara, filed charge sheet against the accused for commission of the offences under Sections 363, 366 and 376 IPC in the Court of learned Metropolitan Magistrate, Ahmedabad for commission of the offences under sections 363, 366 and 376 IPC.

4.4. As the offences under sections 363, 366 and 376 IPC are exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad, committed the case to the City Sessions Court, Ahmedabad.

4.5. The learned Additional City Sessions Judge, Court No.9, City Sessions Court, Ahmedabad to whom the case was made over for trial, framed charge against the accused for commission of the offences under sections 363, 366 and 376 IPC. The charge was read over and explained to the accused and as the accused pleaded not guilty to the charge and claimed to be tried, he was tried by the trial court, in Sessions Case No. 39 of 2003.

4.6. In order to bring home the charge levelled against the accused, the prosecution has examined in all 9 witnesses and relied upon their oral testimonies. They are as under:

P.W. No.	Name	Status	Ex. No.	Page No.
1	Geetaben J. Sathwara	Compla-inant	5	45-54
2	Prosecutrix X	victim	6	55-56
3	Khodidas Kashiram Patel	Panch witness of the scene of offence	7	67-70

P.W. No.	Name	Status	Ex. No.	Page No.
4	Renuka Mahesh Patel	Panch of the recovery of the clothes of X	12	71-74
5	Babubharti Laxmanbharati Goswami	Eye witness	17	75-82
6	Bhupendra Jayantilal Kansara	Investigating officer – police officer	20	83-92
7	Suresh Ramkrupal Mishra	Panch witness of recovery of clothes of accused	27	93-96
8	Dr. Krunal Dashrathbhai Patel	Medical Officer who examined prosecutrix X	30	97-104
9	Dr. Shilpa Kanubhai Yadav	Medical officer who examined the accused	34	105-110

4.7. To prove the culpability of the accused, the prosecution has also produced and relied upon the documents like complaint, injury certificate of X as well as the accused, panchnama of the scene of offence, panchnama of recovery of

clothes of X as well as the accused and FSL report.

4.8. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution and recorded his further statement under section 313 of the Code. He denied the incriminating evidence produced by the prosecution and further stated that there was an eve-teasing of Geetaben by some people of 'Saraniavas' and, therefore, he has been falsely roped in this false rape case and false complaint was filed against him. He denied the case of the prosecution in toto but did not produce any evidence nor did he examine any witness in support of his defence.

4.9. On appreciation, evaluation, analysis and scrutiny of the evidence of the prosecution, the trial court came to the conclusion that charge against the accused for commission of offence

under section 366 IPC has not been proved and therefore he was given benefit of doubt in respect of the said charge. However, the prosecution has successfully proved that X who was aged about 7 years at the relevant time has been kidnapped by the accused from lawful custody of her father without consent and with an oblique motive to commit rape on her and he has taken her to a dilapidated house and ravished her and therefore complicity of accused for commission of offences under sections 363 and 376 IPC has been duly established and resultantly the trial court held him guilty for the said offences and convicted and sentenced him to suffer RI, to which reference is made in the earlier paragraphs of this judgment, which has given rise to this appeal at the instance of the original accused.

5. Mr. Buddhbhatti, learned advocate appointed by Legal Aid Committee for the accused, has contended that the accused is quite innocent and he has been falsely implicated. It is also highlighted by him that as per the medical

evidence, hymen of X was not ruptured and therefore there was no penetration of penis of accused into the vagina of X and unless penetration is completed, offence of rape cannot be held to be proved. He also contended that the judgment and order of the trial court is based on inferences and surmises. He has also submitted that there is only an attempt to commit rape and actual rape had not taken place. According to him, if we accept the medical evidence, the charge of rape is not proved as the accused has only attempted to commit rape and in that case gravity of the offence is very much less and, therefore, according to him the punishment is required to be reduced as the accused has committed the offence under section 376 read with Section 511 IPC. Therefore, he submitted that the appeal may be partly allowed.

In the alternative, he has submitted that if this Court comes to the conclusion that the accused has committed the offence of rape, in that case, looking to the age of the accused,

which was 20 years at the time of the incident, leniency may be shown towards him so far as the sentence is concerned. It is, therefore, submitted by him that in view of the proviso to sub-section (2) of Section 376 IPC, the sentence of ten years may be reduced by awarding the sentence undergone by him. He, therefore, urged to pass appropriate order in this regard.

6. Mr. KT Dave, learned APP for the respondent - State of Gujarat, in reply to the above contentions of Mr. Buddhbhatti, has submitted that there is voluminous reliable, trustworthy and clinching evidence on record which unequivocally and unerringly proves that the accused kidnapped X from the lawful guardian and taken her to a dilapidated house and committed rape on her. It is also asserted by him that now-a-days offence of sexual harassment and rape, more particularly on minor girls, are on increase. According to him, the evidence of P.W.1, the complainant, P.W.2, victim X, P.W.5, eye witness, P.W. 3, 4 and 7, who are the panch

witnesses and P.W. Nos. 8 and 9 medical officers who have examined the victim X and the accused respectively and the medical certificates and FSL report are so eloquent and so clinching that they corroborate each other and they leave no room for any doubt that the accused had kidnapped X and thereafter taking her to a dilapidated house ravished her. The medical certificates in respect of the victim X and the accused as well as FSL report establish that there was penetration of penis by the accused into the vagina of X as a result of which there was profuse bleeding from the vagina of the X. Therefore, according to him, the prosecution has established the charge levelled against the accused for commission of the offences of kidnapping and raping the victim X, beyond reasonable doubt, and more particularly looking to the age of the victim and the way and the manner in which the offence has been committed by the accused, no mercy can be shown to him by reducing the sentence imposed on him. He has also submitted that there is no merit in the appeal

and the appeal does not deserve any consideration of this Court. He, therefore, urged to dismiss the appeal.

7. This court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with criminal appeals, this Court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

8. At the outset, be it stated that from the very beginning, the case of the prosecution has been that X, who was aged about 7 years at the relevant time, while she was returning home from her school, the incident in question took place. The maternal and the paternal aunt of X, who is the complainant in instant case, has been very specific that her younger sister has one daughter and one son. The daughter was studying in Nikita Primary School in standard 2. The complaint given by her also gives these details wherein she has not specified the birth date. When X was taken for the medical examination, her age has been reflected in the medical case appears which is of 7 years and the investigating officer had also collected a certificate from the principal of Nikita Primary School which is identified and proved during his deposition which shows the birth date of X to be 19.12.1995 and she is said to be studying in standard 2. Her original birth certificate has been brought on the record which shows her birth date to be 19.12.1995. Both these documents being public documents and are

admissible in evidence and, therefore, there is no reason to disbelieve the said two certificates showing the birth date of X as 19.12.1995. Therefore, on the day of the incident, she was 6 years and 10 months old. It is also the prosecution case that she has been kidnapped by the accused and taken to a dilapidated building and after removing her undergarments, committed rape on her. It is the case of the prosecution that victim X was found coming out of the dilapidated building and she was crying and the accused was found following her who also came out from the said building. On the complainant asking the victim X as to whether the accused had done anything wrong to her, victim X replied in affirmative and on the complainant raising shouts to catch hold the accused, he started running and the passersby who were within an earshot, chased him and caught him on the spot and took him to the police station.

9. In order to prove the case of the prosecution, the prosecution has firstly examined

and relied upon the evidence of P.W.1,Geetaben J. Sathwara, Ex.5, page 45 of the paper book. She has, inter alia, testified that she lives at Shivdham society with her family. Sangeetaben is her younger sister. Both the sisters are married to the real brothers. They live in a joint family. Sangeetaben has a daughter and one son and that daughter is X who studies in Nikita Primary School in Standard 2. Her school timings are from 12 noon to 5 P.M. She has further testified that on 9.10.2002, X had gone to her school at 12 noon. It takes about 25 minutes to walk to the school. There are other two/three children studying in Nikita Primary School and they all go together but on the day of the incident X went to school all by herself. This witness found X coming back from the school while she was going to purchase vegetables. But, X did not reach home. After she returned from the market, her sister had told her of the fact that X was missing. When they made a search, after a while, she was found coming out from a nearby building which was in an incomplete and

dilapidated stage and the accused was found to be coming out from the same building following the girl. This witness has also testified that she has filed complaint in this regard.

9.1. This witness has been cross-examined at length by the learned advocate for the accused. She has admitted that as the guardian, in the school of X, her parents have been named and they both are living and residing together. So many suggestions have been put to her in her cross-examination suggesting that no such incident had ever happened and the accused has been wrongly roped in the rape case but she has repelled all the suggestions and withstood the test of cross-examination and nothing substantial has been brought out in her cross-examination which would make her evidence impeachable. On the contrary, her evidence inspires confidence. Her evidence is trustworthy and there is no reason for her to tell lie. According to this court, the trial court has rightly relied upon the evidence of P.W.1,Geetaben J. Sathwara.

10. The prosecution has thereafter examined and relied upon the evidence of P.W.2, prosecution X, Ex.6, page 55 of the paper book. She is a child witness and, therefore, prior to administering oath to her, certain questions were asked to her by the trial court to ascertain as to whether the witness understands the sanctity of oath and also about the incident and after ascertaining the said aspect and after satisfying that the witness understands the sanctity of oath and about the incident, she was given oath and her statement was recorded in question and answer form.

10.1. The prosecutrix X has testified that she goes to school at 12 noon and comes back at 5.30 P.M. and it is her mother who brings her back. On the day of the incident, she went to the school at 12 noon and had worn a chaniya choli of red colour. While she was returning home at 5.30 P.M. she met her aunt at the Shivdarshan society who was going to the market for purchasing

vegetables. When she was returning home, she met a boy behind her house who threatened her that she should go with him or he will hit her on the head with a stone and then she was taken in an old shop.

10.2. In her cross-examination, she had also replied that in the school her father's name is shown to be Rajnikant and her mother's name is Sangeetaben and she lives with her parents. On the date of incident, her mother had not gone to fetch her from the school and she was coming all by herself. She had identified the accused before the court as the boy who had taken her inside the old shop and she had been specific that before she saw him twice in the court i.e., on the first day when her deposition was not recorded and on the day on which her deposition was recorded before the court but she had seen him for the first time on the date of incident. The trial court found this child witness to be extremely young and innocent. Her entire deposition was required to be taken in the question and answer

form but she had been very clear and specific in answering all the questions that had been put to her. Her evidence needs to be read as a whole and not by reading one answer here and there. On appreciating the entire evidence, it has to be concluded that the prosecution has succeeded in proving the charge of kidnapping and raping the prosecutrix X by the accused.

11. Thereafter the prosecution has examined and relied upon the evidence of P.W.5, Babubharti Laxmanbharti Goswami, Ex.17, page 75 of the paper book. He has testified that he lives in house No.118 of Shivdham Society whereas the complainant and X live in House No.122. They are neighbours since last two years and he works as a driver in AMTS but due to financial crunch in AMTS he has started his business and does not go for job. On 9.10.2002 at around 6.30 P.M. he was going on the road in the society when he heard shouting “catch him, catch him” and, therefore, he ran after the accused and he also found that there were two persons with wooden sticks in hand

coming from the opposite side of the road who caught the accused and was inquired of the name and he said his name as “Munno”. As the mob gathered, those two persons with wooden sticks had gone away and, therefore, their names were not known. In the meantime, Sangeetaben came with X and told that the boy did a bad thing with her. He also inquired with X and she said that the accused had threatened her to hit her with a stone on the head and took her in the shop which was incomplete and in a dilapidated condition. This witness had stated that he first went to the police station and informed them and came with the police in about 15 to 20 minutes. As the police station is at a distance of about half a km. Geetaben went there walking.

11.1. This witness was cross-examined at length by the learned advocate for the accused. In the cross-examination, he has repelled all the suggestions put by the defence with regard to the incident in question has not taken place. He reiterated that the incident has taken place and

he has also gone to the police station along with P.W.1, Geetaben. He withstood the test of cross-examination and nothing substantial has been brought out from his cross-examination which would impeach his credibility.

12. On reappraisal of the evidence of the aforementioned three witnesses, it cannot be disputed that while X was returning from the school she was kidnapped by the accused and he took her into a dilapidated building and ravished her.

13. Now this takes us to examine the medical evidence. In this connection, the prosecution has examined and relied upon the evidence of P.W.8, Dr. Krunal Dashrathbhai Patel, Ex.30, page 97 of the paper book. He has testified that on 9.10.2002 when he was serving as a causality Medical Officer at the Civil Hospital, a woman police constable having buckle No. 6680 had brought X to the hospital. The history of the incident was given by her mother and as per the

history that when the victim X was returning home from the school, one unknown man had taken her to the shop which is still under construction at Shivdham society, Odhav, and he committed rape on X which fact came to be known to both of them, she and her sister, who had gone out to search for the girl. The doctor has testified that he recorded the history in his own handwriting. He examined the prosecutrix X clinically and has issued certificate of injuries which is on record at Ex.32. This witness noticed blood stains on vulva, left and right side of thigh from below umbilicus upto vulva area on both the ankles as well as on the outer side of the right thigh. The victim X was conscious. There was no injury found in the vagina and hymen was found intact. There was no presence of spermatozoa and gonnocoeci. The doctor has opined that if an adult man commits an attempt for a sexual intercourse, there is a possibility of blood coming out.

13.1. In his cross-examination, this witness has stated that victim girl X was too innocent

and the history was given by her mother. He has clarified that the history is generally written, as per the convention, before the patient is examined. In his cross examination, he has agreed to the suggestion that if hymen is intact and not torn, there could be no penetration. Although, he did not agree to the suggestion that if a girl falls down, some such type of blood stains can be found with the reasoning that in that event, there ought to be abrasion on some parts of the body. He has further agreed to the suggestion that if a girl aged 7 years wears petticoat of thick material, there may be no possibility of abrasion. He was shown the muddamal article clothes of the victim X and said that there may not be abrasion if the petticoat is worn by the prosecutrix X, although he showed his ignorance about whether the material of the petticoat can be of silk or nylon. It needs to be noted at this juncture that the petticoat worn by the girl at the time of incident is of a very thin material which has lot of embroideries as well and even if she falls, the zari embroidery

embedded in the petticoat also can give the abrasion and the type of profuse bleeding which was found on different parts of X, her clothes as well as on the clothes of the accused, if it could have been as a result of her falling, there ought to be a tear or a hole in the petticoat or in her nicker and abrasions on different parts of body. These things are completely absent in the muddamal articles brought before the trial court which were in a sealed condition and no such things are also found in the opinion of the FSL. The material of the petticoat is surely not cotton but it is the mixture of nylon and silk. Another thing that needs to be noted is that this witness had agreed in the questions put to him that in the cases where the rape is alleged swelling, redness and even the minor injuries on the internal and private parts of the prosecutrix would have lots of importance. He agreed that no such observation had been noted by him in the injury certificate Ex.32 which is suggestive of the examination of this witness being not as thorough as is required of a Medical Practitioner

specially dealing with such serious case of rape. The blood which he has found on the different parts of the body, in his opinion, could be as a result of the internal injuries. He could not find the same, as according to him, the patient was non-cooperative. He further agreed to the suggestion that hymen anatomically having been situated deeper, a light penetration may not tear it.

13.2. On reappraisal of the evidence of P.W.8, Dr. Krunal D. Patel, Ex.30, though he has initially agreed to the suggestion that if hymen is intact and not torn, there could be no penetration, he further agreed to the suggestion that hymen anatomically having been situated deeper, a slight penetration may not tear it. Looking to the injury certificate issued by him, which is at Ex.32, it is clear that blood stains were found present on vulva on left and right side of the thigh. Therefore, there is a reason to believe that there was penetration of the penis of the accused into the vagina of X.

14. The prosecution has thereafter examined and relied upon the oral testimony of P.W.9, Dr. Shilpa Kanubhai Yadav, Ex.34, page 105 of the paper book. She has examined the accused. In her oral testimony she has stated that she was working as CMO in the Civil Hospital since last three years and a police constable, having buckle No.8504, had taken the accused to her for the physical examination on 10.10.2002 at 1.10 P.M. As per the convention, she had written down the history which was given by the accused himself wherein he stated that “previous day in the evening he was going for taking liquor when he found a little girl coming in the Chamundanagar and, therefore, she was taken to a room for doing a wrong thing to her. The public had found him and he was caught because he did a wrong thing to her.” She noted down the history as given by the accused in the case paper which has been brought before the trial Court, which is on record at Ex.35. The injuries found by her on the person of the accused were 3 x 2 cms,.

reddish brown in colour abrasion in the posterior of right forearm and 3 x 2 cms. red colour abrasion of the left knee. His secondary sex characters were of well developed person being the beard and mustache. There was no smegma present on the penis. The blood was present on the glanse penis. Vaginal epithelial cells were not seen and the samples of his saliva, semen and pubic hair were also taken which she had given to the police constable. This medical certificate is at Ex.36 and the injuries she had found on the knee and the forearm were possible in about 12 hours time. She also opined that these injuries as well as the blood in the glanse penis would be possible if the person attempts to make a rape or does the rape. She had been specific that the police was not present when the accused gave his statement and it is a general practice to make the police sit outside when the patient is being examined. One Dr. R.R. Patel had given the accused an injection of tetanus as injuries were found on his person and he was also given an ointment. In cross-examination, this witness has

stated that both the injuries on the forearm and the knee could be 4 to 6 hours old. She was not given the history of mob beating him. She, of course, agreed to the suggestion that if a man falls down on a tar road when the public runs after him to catch him, the injuries shown in Ex.36 on the forearm ad the knee are possible. Although for the injuries found on the penis, she had refused them to be possible without intercourse. She also disagreed to both the suggestions that if the accused is dragged on a tar road or is dashed to a wall with his front portion of the body being either towards the road or on the road, such injuries are possible in the penis.

14.1. On reappreciation of the evidence of P.W.8, Dr. Krunal D. Patel, Ex.30 and P.W.9, Dr. Shilpa K. Yadav, Ex.34, who have clinically examined the prosecutrix X and the accused respectively, their testmonies completely corroborate the evidence of P.W.1, Geetaben- the complainant and more particularly P.W.2, the

prosecutrix X.

14.2. On over all re-appreciation of the evidence of P.W.9, Dr. Shilpa K. Yadav, adduced by the prosecution, it is clear that the statement given by the accused before P.W.9, Dr. Shilpa Yadav to the effect that on the previous day in the evening he was going for taking liquor when he found a little girl coming in the Chamundanagar and therefore she was taken to a room for doing a wrong thing to her. The public had found him and he was caught because he did a wrong thing to her. This is an extra-judicial confession made by the accused before P.W.9, Dr. Shilpa Yadav and there is no reason for P.W.9, Dr. Shilpa Yadav to say a lie on oath before the court as well as to make mention about the same in the medical certificate. Dr. Shilpa Shah has also denied the suggestion about the presence of police while the said history was recorded. This witness is an independent witness who has no enmity with anybody who is connected with this incident. Even the history given by the accused

alone is taken into consideration or not taken into consideration at all, the injuries on his forearm and knee can be seen keeping in view of the fact that the scene of offence is a shop situated in a building which is still under construction and being incomplete the shop had cement, bricks and other stones on the floor. The panchnama of the scene of offence from where the samples of the earth and cement were collected, goes to show that when the girl was made to sleep and he had removed her clothes and also slept on her as narrated by X, the injuries on these parts of his body further lend corroboration. Moreover, the injuries on his penis, as per the opinion of the doctor would not be possible except when a person does a sexual intercourse.

14.3. The doctor who examined the prosecutrix X had also agreed to the suggestion that the hymen can be intact if there is a partial penetration and the blood that came out can be as a result of internal injuries. The blood was evident in the clothes of both the prosecutrix X and the accused

as well as was seen visibly soon after the incident by P.W.1, Geetaben- the complainant, P.W.5 Babubharti Laxmanbharti Goswami and P.W.6 Bhupendra J Kansara. The investigating officer also had deposed with regard to the same, not to talk of the panchas in whose presence the said clothes were recovered. If the medical persons could not find internal injuries, but from the presence of the blood and from the entire evidence that has come on the record when it can be concluded that such amount of profuse bleeding would not have been there had there not been a penetration, and as held by this Court even a mere touch of private organ to the visiting organ would suffice to institute an offence of rape. The possibility of a partial sexual action, when cannot be ruled out, in the opinion of the trial court, the prosecution succeeded in proving offence under Sections 363 and 376 IPC.

15. The prosecution has also examined P.W.6, Bhupendra Jayantilal Kansara, investigating officer, Ex.20, page 83 of the paper book. He has

testified as to what he has done after registering the complaint lodged by P.W.1, Geetaben and also regarding the steps he took during the course of his investigation. This witness was also cross-examined at length but nothing substantial has been pointed out which would impeach his credibility.

16. It may be noted that P.W.3, Khodidas Kashiram Patel, panch witness of the panchnama of the scene of offence, Ex.7, page 67 of the paper book, P.W. 4, Renuka Mahesh Patel, panch witness of the panchnama of the recovery of the clothes of victim X, page 71 of the paper book and P.W.7, Suresh Ramkrupal Mishra, panch witness of the panchnama of the recovery of clothes of the accused, Ex.27, page 93 of the paper book have also supported the prosecution case. Since all the panch witnesses have supported the prosecution case in toto with regard to the panchnamas in respect of which they were panch, it is not necessary for us to repeat the same in verbatim in this judgment.

17. In aforesaid view of the matter, according to this court, the prosecution has been able to establish the charge levelled against the accused for having committed the offences of kidnapping prosecutrix X from her lawful guardian and committing rape on her.

18. We find ourselves in complete agreement with the said finding, ultimate conclusion and resultant order of conviction passed by the trial court and we are of the view that no other conclusion except the one reached by the trial court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence.

19. The manner and way in which the offence of rape was committed by the accused on a six-years and ten months-old girl, we are of the firm opinion that no leniency for reduction of

sentence can be shown upon the accused.

20. At this stage, it would be advantageous to refer to the latest judgment of the Supreme Court in the case of State of M.P. v. Santosh Kumar, (2006) 6 SCC 1. The Supreme Court has considered the “adequate and special reasons” for awarding of sentence below the statutory minimum in the case of offence of rape. In the said case, a six-year-old child was subjected to sexual abuse by the respondent. The trial Court found the respondent guilty of the offence punishable under Section 372(2)(f) IPC. The respondent was sentenced to undergo 10 years' RI with a fine of Rs.500/- with default stipulation. In the appeal filed before the High Court, the accused did not question the conviction, but prayed for reduction in sentence. The High Court reduced the sentence for the offence punishable under Section 376(2)(f) IPC to 5 years, while maintaining the sentence in respect of other offences. The only ground indicated by the High Court to reduce the sentence was the young age of

the accused and he being a member of the Scheduled Tribe. In the said circumstances, the questions that arose before the Supreme Court were the proper sentence and acceptability of reason which weighed with the High Court for reducing the sentence.

20.1. Allowing the appeal and restoring the minimum mandatory statutory sentence imposed by the trial Court, the Supreme Court **Held**:

> *"Both, in cases of sub-sections (1) and (2) of Section 376 the court has the discretion to impose a sentence of imprisonment less than prescribed minimum for "adequate and special reasons". If the court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. In order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the court to impose a sentence*

less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated.

What is applicable to the trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court in the present case is the young age of the accused and the fact that he belongs to a Scheduled Tribe. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

It is to be noted that the victim in the instant case is a child who was about 6 years of age at the time of commission of offence. Section 376(2) IPC provides for a more

stringent punishment when the victim is under 12 years of age. In the instant case, the High Court was clearly in error in reducing the sentence without recording any adequate and special reason in imposing a lesser sentence."

20.2. Applying the principles laid down by the Supreme Court in above referred to judgment to the facts of the present case, it is seen that in the instant case also the victim X was a six-years and ten months old girl, therefore, the sentence of RI for 10 years for commission of offence under Section 376 IPC and sentence of RI for two years for commission of offence under section 363 IPC, imposed on the accused, does not call for any interference and looking to the gravity of the offence the order for running both the sentences consecutively i.e., one after the other also does not warrant any interference of this court.

21. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and

order of conviction and sentence recorded by the learned trial court and hence, this appeal lacks merit, and deserves to be dismissed.

22. For the foregoing reasons, the appeal fails and is accordingly dismissed. The impugned judgment and order of conviction and sentence dated 6.6.2003 recorded by the Additional Sessions Judge, Court No.9, City Sessions Court, Ahmedabad in Sessions Case No.39 of 2003 is hereby confirmed and maintained.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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(karan)